Stagehands Referral Service, LLC *and* Stephen Foti

International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO (Meadows Music Theatre) *and* Stephen Foti. Cases 34–CA–10971 and 34–CB–2774

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 24, 2005, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The General Counsel filed exceptions and a supporting brief; the Respondents filed a response brief; and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The complaint alleged that Local 84 (the Union) violated Section 8(b)(1)(A) by failing to refer stagehand Foti to various employers, including Stagehands Referral Service (SRS), because Foti was not a member of Local 84, and for reasons other than Foti's failure to tender the periodic dues and initiation fees uniformly required for membership, and violated Section 8(b)(2) by attempting to cause or causing employers to violate Section 8(a)(3). The complaint also alleged that SRS violated Section 8(a)(3) and (1) by discrimination in hiring in order to encourage membership in the Union. As the judge observed, this case is "not the usual 8(a)(3) and 8(b)(1)(A) and (2) case," where an employer fires or fails to hire an employee because of his union activity, or a union refuses to refer an employee to jobs because of intraunion or protected concerted activities. This dispute centers on whether the Union's failure to refer Foti was justified by his poor work, as the Union argues, or was unjustified because it was based on Foti's nonmember status, or other arbitrary reasons, as the General Counsel argues. For the reasons discussed below, we find the Union's failure unjustified, and therefore reverse the judge on the merits. However, we adopt the judge's denial of the General Counsel's motion to amend, without prejudice.

I. FACTS

The Union supplies stagehands to three venues through its exclusive hiring hall, and to a fourth venue, a Native American-owned casino (Casino), through SRS.[2] It appears that SRS, a limited liability corporation, was established for the sole purpose of supplying stagehands to the Casino, because the Casino is willing to employ union members, but is not willing to sign union contracts. The Union's president, Charles Morris, and its business manager, Charles Buckland, are the only two officers of SRS. Operationally, SRS uses the Union's employee list to dispatch employees to the Casino, invoices the Casino for services rendered, and pays the employees.

Buckland operates the Union's hiring hall. He makes referrals from a three-part list: (1) union members by seniority; (2) wardrobe employees not at issue here; and (3) nonmembers (extras), listed alphabetically. Each week Buckland begins at the top of the member section, regardless of how far down the list he reached the previous week, referring extras only in the absence of available members. If members have equal seniority, Buckland will, at his discretion, consider other factors, including "commitment to the union" and performance. No written rules govern hiring hall operations.

After working as a stagehand on the west coast for many years, Charging Party Stephen Foti moved to Connecticut in late 2001. He contacted the Union about job referrals; within about 5 months, the Union began referring Foti to the venues it served, and occasionally, to sister locals. Originally, the Union instructed Foti to call every Monday for referrals; he ceased calling weekly once the Union consistently began calling him. None of

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Complaint par. 7 alleges that the Union and "various employers, including but not limited to the Horace Bushnell Theatre, Madison Square Garden, and the Meadows Music Theatre, have maintained collective bargaining agreements and practices requiring that [the Union] be the exclusive source of referrals of employees." The Respondents' answer admits par. 7. This allegation arguably covers referrals to SRS as an employer, even though SRS is not specifically named. While there is no record evidence of a contract between the Union and SRS containing an exclusive hiring hall provision, the record is clear that SRS effectively acts in a "pass-through" capacity and was established solely as a vehicle for referring stagehands to the Casino. SRS has no separate place of operation from the Union; union agents Morris and Buckland use the same three-part list for all referrals, including those to SRS. There is no evidence that SRS turns to anyone but the Union for referrals, and no evidence that it dispatches employees to any venue other than the Casino. The Board has held that the existence of an exclusive hiring hall can be established by evidence of practice or oral agreement. *Plumbers Local 198 (Stone & Webster)*, 319 NLRB 609, 611–612 (1995), citing *Iron Workers Local 118 (California Erectors)*, 309 NLRB 808 (1992); *Iron Workers Local 10 (Guy F. Atkinson Co.)*, 196 NLRB 712 (1972), enfd. mem. 83 LRRM 2409 (8th Cir. 1973). In the absence of any finding by the judge on this issue, we find that the General Counsel has established an exclusive hiring hall arrangement between the Union and SRS.

the venues ever complained to the Union or SRS about Foti's work.

In April 2004,[3] Foti and nine other employees applied for union membership, paid the required fees, and passed a background check. On April 26, the Union's executive board interviewed the applicants and approved all of the applications. At a regular membership meeting immediately following the executive board meeting, members were invited to discuss the applicants' qualifications. Member Jason Philbin spoke against Foti.[4] He testified that he told the membership that Foti was lazy and often late.

At the next membership meeting, conducted May 24, members were reminded of the Union's membership criteria—aptitude, good work ethic and trade skills, and commitment to the cause of trade unionism—and then voted on the applications. They approved all applicants except Foti, who was rejected by a vote of 33–11. The Union had never before rejected an applicant.

Credited evidence is that Foti told Morris, as he was being escorted out of the union hall, that this was the most embarrassing thing he had ever experienced. A few days later, Buckland asked Morris, "Where do we go from here," and Morris replied that he "took" Foti's words to mean that he was too embarrassed to work with union members again.[5] Foti's then-current referral ended on Saturday, May 29. On Monday, May 31, Foti called Buckland seeking work. Buckland mentioned the vote, telling Foti that the Union would not refer Foti to jobs because his application for membership had been denied. Foti asked if that meant that SRS also would not refer him to the Casino. Buckland indicated that he would not send Foti to the Casino either. Foti effectively stopped seeking referrals after that call.

In November, the Union received notice of an unemployment compensation claim filed by Foti against SRS. Morris called Foti and asked why he had filed for unemployment compensation, even though he had not been calling in on Mondays seeking work. Foti responded angrily about his previous treatment by the Union. Morris told Foti to call Buckland on Monday, November 29. Foti did and was referred to work. Foti did not call Buckland again until late March 2005.

At the hearing, union members testified as to why they voted against Foti: tardiness, lack of initiative, not carrying the required tools, argumentativeness, need for continuous direction, and unsafe work practices. Finding it difficult to "reconcile Foti's testimony about his work abilities" with the testimony of the members, the judge "indirectly discredited" Foti. Morris and Buckland testified regarding difficult negotiations with the venues; the quid pro quo for improved wages and working conditions was to send only qualified, competent employees.

The Union's "lateness reports," however, indicate that other stagehands have worse tardiness records than does Foti. For example, Philbin (who had spoken against Foti) was disciplined for being a "no show." He was "no longer being assigned to the show that he missed." The Union's policy requires written reports of safety and other job related incidents; none were filed regarding Foti. By contrast, the Union continued to refer Al Lopez after he was the subject of an incident report. Foti has never been reprimanded or disciplined, nor has any employer complained about his work.

II. JUDGE'S DECISION

The judge dismissed the complaint. Acknowledging the Respondents' failure to refer Foti after the May vote, the judge reasoned that the "determinative question" was whether they failed to refer Foti for a prohibited motive. The judge quoted *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), remanded 496 F.2d 1308 (6th Cir. 1974), enf. denied 555 F.2d 552 (6th Cir. 1977), for the settled proposition that when a union prevents an employee from being hired, the Board presumes that the effect of that action is to encourage union membership, unless the presumption is rebutted by a showing that the action "was necessary to the effective performance of [the union's] function of representing its constituency." Finding no evidence of animus toward protected activity or other unlawful purpose in its decision to cease referring Foti, the judge concluded that "the only reason" the members rejected Foti is because "they found his work and tardiness lacking," and that the Union had thus rebutted the presumption.

The judge rejected the General Counsel's "overly simplistic" argument that the Respondents, by failing to refer Foti after his May 24 rejection, discriminated against Foti for his union activities, i.e., his unsuccessful bid to join the Union. Instead, the judge found that the fact of

[3] All dates are in 2004 unless indicated otherwise.

[4] Union member Cerullo testified that "only Philbin spoke directly about Foti." The judge noted Union President Morris' testimony that "he was amazed at the number of people who spoke negatively about Foti at this meeting," and Business Manager Buckland's testimony that "there were more hostile comments about Foti then [sic] any of the other applicants." The judge does not directly resolve this apparent conflict regarding how many members spoke against Foti, but credits Morris' testimony that "based upon the *statements* made about Foti at the April 26 meeting, and the lopsided vote against him at the May 24 meeting, he assumed that Foti was not a competent worker" (emphasis added). Considered in conjunction with Morris' testimony regarding "the number of people," it appears that the judge found that more members than Philbin spoke against Foti. The General Counsel argues that the judge erred in failing to find that only Philbin spoke against Foti's application. Because we do not find this matter outcome-determinative, we do not pass on this exception.

[5] The Respondents sent two position statements to the Region during the investigation. The first claims that Foti told Morris that he was too embarrassed by the vote to work under the auspices of Local 84, and that Foti would have been referred if he had wanted an available job. The second denies that Buckland told Foti that he would "never be referred to jobs."

Foti's rejection exposed, for the first time, Foti's incompetence, and it was that incompetence that triggered the Respondents' subsequent refusal to refer him. The judge reasoned that if the Respondents were motivated by Foti's lack of union membership they would not have consistently referred him out in the past, when he was not a member.

At the end of the hearing, the General Counsel moved to amend the complaint to allege that the Union operated an unlawful hiring hall. The judge denied the motion and issued a subsequent order denying the General Counsel's motion for reconsideration.

III. THE PARTIES' POSITIONS

The General Counsel filed exceptions. First, the General Counsel argues that the Union violated Section 8(b)(1)(A) and (2) by failing to refer Foti from its hiring hall after May 24, based on his nonmembership status and other arbitrary and invidious reasons, and by failing to refer Foti for employment with SRS based on his nonmembership status. The General Counsel contends that the judge erroneously based his contrary finding on union members' trial testimony, evidence not available to the Union when it refused to refer Foti. If the judge had properly excluded this "post-hoc" evidence from consideration, it would have been clear that the Respondents failed to refer or employ Foti solely because he was denied union membership. Alternatively, the General Counsel contends that, even assuming that the Union was not motivated by Foti's nonunion status, its decision was based on reasons other than Foti's failure to tender the periodic dues and initiation fees uniformly required for membership, i.e., arbitrary and capricious reasons. These arbitrary reasons are evident in the Union's disparate treatment of Foti vis-à-vis others whom the Union continued to refer, notwithstanding conduct worse than Foti's. Further, the General Counsel asserts that the Union's November referral of Foti undermines the conclusion that the Union's conduct was "necessary to the effective performance of its function of representing its constituency."

Second, the General Counsel contends that SRS's refusal to employ Foti after May 24 violated Section 8(a)(3) and (1). The judge erred by: (a) finding that SRS is "really the Union" rather than treating SRS as a distinct legal entity, and (b) failing to apply a *Wright Line*[6] analysis to SRS.

Third, the General Counsel contends that the judge erred by denying the motion to amend. The Union was on notice that the operation of its hiring hall was at issue—the complaint alleged both that the Union operated an exclusive hiring hall and that it failed to refer Foti. Only after Buckland testified at hearing about his three-part referral list, contrary to his pretrial affidavit that there were no documents governing hiring hall operations (other than one page setting forth a schedule for members to call the office), was there sufficient evidence to allege the unlawful operation of the hiring hall. According to the General Counsel, amendment would not prejudice the Union, but failure to amend would prejudice Foti by leaving him remediless. If the Board allows this amendment, Buckland's testimony demonstrates that the Union violated Section 8(b)(1)(A) and (2) by operating its hiring hall without objective criteria or readily ascertainable rules and procedures known to applicants.

In reply, the Respondents argue, first, that May 31, not May 24, is the critical date. During that week, it is "probable" that Buckland and Morris learned more about Foti's deficiencies. Second, the General Counsel attaches undue significance to union member Cerullo's testimony that she could recall only Philbin speaking directly against Foti. Even if the judge did not credit the substance of Philbin's testimony, the judge credited Buckland and Morris who heard Philbin excoriate Foti. Third, no investigation into Foti's work performance was necessary because the May 24 vote and "probable" discussions afterwards told the Union all it needed to know —that people did not feel safe or comfortable working alongside Foti. Fourth, despite the timing between the vote and the Union's decision not to refer him, there is no evidence of a causal relationship between Foti's membership status and the Respondents' decision. The fact that the Union had historically referred Foti out "on a constant basis" completely undercuts any claim that the Respondents were motivated by Foti's membership status, or that the Union's account of the significance of the vote against Foti is pretextual. Finally, the Respondents contend that the judge properly denied the General Counsel's motion to amend.

IV. DISCUSSION

A. Whether Local 84 violated Section 8(b)(1)(A) and (2)

The Supreme Court has upheld the legality of hiring hall referral systems, acknowledging that "the very existence of a hiring hall encourages union membership," but holding that "the only encouragement or discouragement of union membership banned by the Act is that which is 'accomplished by discrimination.'" *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 674–676 (1961) (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 43 (1954)). In *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), the Board explained that there is a rebuttable presumption that arises when a union interferes with an employee's employment status for reasons other than the failure to pay dues, initiation fees, or other fees uniformly required, that the interference is intended to encourage union membership:

> When a union prevents an employee from being hired or causes an employee's discharge, it has dem-

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

> onstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

Thus, a union bears the burden of establishing that referrals are made pursuant to a valid hiring-hall provision, or that its conduct was necessary for effective performance of its representational function. *Teamsters Local 519 (Rust Engineering)*, 276 NLRB 898, 908 (1985), enfd. mem. 843 F.2d 1392 (6th Cir. 1988); *Boilermakers Local 433 (Riley Stoker Corp.)*, 266 NLRB 596 (1983).

It is also well settled that a union cannot operate a hiring hall to discriminate based on an employee's lack of union membership. *Bricklayers Local 7 (Masonry Builders)*, 224 NLRB 206 (1976), enfd. 563 F.2d 977 (9th Cir. 1977); *Utility & Industrial Construction Co.*, 214 NLRB 1053 (1974); *Elevator Constructors Local 6 (Westinghouse Electric Corp.)*, 204 NLRB 578 (1973). Discrimination for invidious, capricious, or arbitrary reasons (such as race, sex, citizenship, or other protected classifications) also violates Section 8(b)(1)(A) and (2). A union commits an unfair labor practice if it administers an exclusive hiring hall arbitrarily or without reference to objective criteria, even absent a showing of animus against nonmembers. *Boilermakers Local 374 v. NLRB*, 852 F.2d 1353, 1358 (D.C. Cir. 1988); *Plumbers Local 619 (Bechtel Power Corp.)*, 268 NLRB 766 (1984); *Plumbers Local 198 (Stone & Webster*), 319 NLRB 609 (1995).

We find that the Union refused to refer Foti for "arbitrary and invidious reasons unrelated to any objective standards for referral," in violation of Section 8(b)(1)(A) and (2). *Stage Employees IATSE Local 646 (Parker Playhouse)*, 270 NLRB 1425 (1984).[7] In rebuttal, the Union argues that the vote of May 24 was an indication that Foti had performance problems. The Union says that, between May 24 and 31, it investigated Foti, and found that he indeed did have performance problems. This explanation is undermined by the disparate treatment of Foti. As set forth below, the General Counsel has shown that other employees whose performance was as bad as or even worse than that of Foti were referred by the Respondent.

One of the Respondents' witnesses' (including Philbin) main complaints against Foti was that he was often late. However, the Respondents' own records show that others were late more often than Foti. Indeed, Philbin did not even appear for work, yet he was only disciplined, not denied referrals. Another common complaint was that Foti did not pull his weight. Yet, Cerullo testified that there were others who did not "step up to the plate much," and they were neither denied union membership nor denied referrals. Union members testified to a few safety issues, but the Respondents did not introduce incident reports or otherwise demonstrate knowledge of these issues at the time they ceased referrals.

The judge cited precedent in which the Board found that the union had met its rebuttal burden (i.e., to show that the action was necessary to perform its representational function), but those cases are distinguishable. Thus, while the judge found *Plasterers Local 299 (Wyoming Contractors Assn.)*,[8] and *Stage Employees IATSE Local 150 (Mann Theatres)*,[9] analogous, there the unions' decisions not to refer were objectively based on employer complaints. Here, no employer complained about Foti's performance.

The judge also cited *Longshoremen Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334, 337 (1981), for the proposition that a union's legitimate interests must be carefully balanced against the interests of individual employees when those employees are engaged in protected activity. However, even the judge conceded that the case is "not right on point." There, the union, following an investigation and formal disciplinary proceedings, debarred an employee from referrals for violating hiring hall procedures, including instigating a wildcat strike. The judge there concluded that some of the employee's conduct was unprotected; therefore, there was nothing to balance against the union's need to effectively represent its constituency. Here, there is no allegation that Foti engaged in unprotected activity.

Finally, in *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1 (2000), revd. 333 F.3d 927 (9th Cir. 2003), the last case cited by the judge, the Board found that the union did not act arbitrarily when it denied referrals to an individual. That person had been

[7] Chairman Battista agrees that the Union's refusal to refer Foti was for arbitrary and invidious reasons. In addition, he believes that the refusal to refer was based on the denial of the application for membership, which denial was based on grounds other than a "failure to tender . . . periodic dues." See Sec. 8(b)(2). After the May 24 vote denying membership to Foti, Business Manager Buckland told Foti, on May 31, that the Union would not refer Foti because membership had been denied to him.

[8] 257 NLRB 1386, 1395 (1981) (union may use reasonable judgment in determining whether to send a particular individual to a particular job; complaint dismissed where union's judgment as to employee's lack of skills was objectively based on union member and employer complaints and was only reason for nonreferral, and there was no evidence of hostility or bad faith).

[9] 268 NLRB 1292, 1296 (1984) (no violation of Sec. 8(b)(1)(A) and (2); union reasonably concluded, on the basis of numerous employer complaints about employee's work, further referral of the employee "would jeopardize its position as the exclusive supply of the employer's employees").

lawfully expelled from the hiring hall because of 15 years of misconduct. The union concluded that 10 months later there was still a valid concern about misconduct, and thus the union would not refer him. Here, the Union's disparate treatment of Foti undermines any claim that such performance concerns motivated the Union's refusal to refer Foti.

B. Whether SRS violated Section 8(a)(3) and (1)

SRS admits it is a statutory employer. The General Counsel argues that the judge erred in blurring the Union's and SRS's identities and that the judge should have applied the *Wright Line* test to SRS. We need not decide whether the judge erred in not applying *Wright Line* to SRS, given SRS's admission that it is a statutory employer and the Board's holding in *Wolf Trap Foundation*, 289 NLRB 760 (1988), that employers will be jointly and severally liable for a union's discriminatory operation of a hiring hall if they know or can be reasonably charged with notice of a union's discrimination.[10] Here, there is no question that SRS, run by the same two individuals who operate the Union's hiring hall, had actual notice of the Union's discriminatory treatment of Foti. Thus, we find that SRS violated Section 8(a)(3) and (1) and is jointly and severally liable with the Union for Foti's remedy.

C. Motion to Amend

At the end of the hearing, the General Counsel moved to amend the complaint to allege that the Union operated an unlawful hiring hall (without objective criteria and without readily ascertainable rules and procedures). The General Counsel contended that the complaint, as pled, put the Union on notice that the operation of its hiring hall was at issue; that the motion was timely, having been made as soon as evidence of the three-part referral list "came to light"; and that, through Buckland's testimony, the operation of the hiring hall had been fully litigated. The judge denied the motion because, in his view, it was untimely and because the charges referred only to Foti. In his subsequent Order denying reconsideration, the judge explained that the General Counsel was on notice that the operation of the hiring hall could be an issue upon receipt of Union President Morris' January 2005 affidavit and attached memo, which, while "not as clear as one would hope . . . certainly give the impression that the Union's hiring hall may have been operated with inadequate rules and procedures and should have alerted [the General Counsel] that the hiring hall may have been operated in an unlawful manner and that the Complaint should be amended appropriately."

Board Rules and Regulations, Section 102.17, allows amendments only if they are "just." The Board evaluates three factors: (1) whether there was surprise or lack of notice, (2) whether the General Counsel offered a valid excuse for its delay in moving to amend, and (3) whether the matter was fully litigated. *Cab Associates*, 340 NLRB 1391, 1397 (2003).

Contrary to the General Counsel's position that all three factors support granting its motion, we find that granting the motion would not be "just." First, the complaint names only Foti as a discriminatee, and the Respondents were certainly not given notice that the field of discriminatees might be thrown wide open and the operation of the hiring hall placed in issue. Second, the General Counsel did not move to amend as soon as the existence of the telephone list "came to light," but only after all of the witnesses had testified and the Respondents had rested. While the General Counsel offered the Respondents additional time to put on additional evidence, such an opportunity does not necessarily cure the problem, and the reasons proffered for the delay do not justify waiting until the very end of the hearing. Finally, the asserted lack of objective criteria for operating the hiring hall appears to have little or no bearing on the Union's decision not to refer Foti.[11]

The Board has denied amendment under circumstances virtually identical to those presented here. See *Consolidated Printers*, 305 NLRB 1061, 1064 (1992) (Board affirmed judge's ruling denying post-evidentiary amendment because the General Counsel did not explain the delay; the delay was "of consequence" given that respondent had presented its defense; it could not be "glibly assumed" that respondent's handling of its case would have been unchanged; giving respondent time to submit further evidence would not cure the prejudice); *New York Post Corp.*, 283 NLRB 430 (1987). Thus, we affirm the judge's denial of the General Counsel's motion to amend.[12]

ORDER

The National Labor Relations Board orders that

A. The Respondent, International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO, its officers, agents, and representatives,

1. Cease and desist from

(a) Refusing to refer Stephen Foti for employment for arbitrary, invidious, or capricious reasons.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[10] Previously, the Board had imposed strict liability, holding an employer liable even if it had no knowledge, actual or constructive, of the union's discriminatory operation of a referral system.

[11] Cf. *Stage Employees IATSE Local 412* (*Asolo Center)*, 308 NLRB 1084, 1089 (1992), enfd. mem. 15 F.3d 1096 (11th Cir. 1994) (union used complete absence of standards and rules to thwart employee's efforts to seek employment in violation of Sec. 8(b)(1)(A)).

[12] We make this ruling without prejudice to the right of any interested party to file charges regarding the Respondents' operation of the hiring hall.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Stagehands Referral Service, LLC, make Stephen Foti whole, with interest, for any loss of wages and other benefits he may have suffered by reason of the Respondent Union's discriminatory failure to refer him to employment after May 24, 2004.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its union hall or facility, copies of the attached notice marked "Appendix A."[13] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by an authorized representative of the Respondent Union, shall be posted by the Respondent Union and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

(d) Reasonable steps shall be taken by the Respondent Union to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Forward signed copies of the notice to the Regional Director for Region 34 for posting by the Respondent Stagehands Referral Service, LLC, at all locations in their places of business where notices to employees are customarily posted.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Union has taken to comply.

B. The Respondent, Stagehands Referral Service, LLC, Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining with Respondent International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO, an exclusive hiring hall system under which applicants for employment are denied referrals for employment for arbitrary, invidious, or capricious reasons.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Jointly and severally with Respondent International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO, make whole Stephen Foti for any loss of earnings and benefits he may have suffered after May 24, 2004, by reason of the discrimination against him.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its place of business copies of the attached notice marked "Appendix B."[14] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by Respondent Stagehands Referral Service and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition, post in such places copies of "Appendix A," which are forwarded to Respondent Stagehands Referral Service, LLC by the Regional Director for Region 34.

(d) Reasonable steps shall be taken by Respondent Stagehands Referral Service to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, SRS has gone out of business or closed the facility involved in these proceedings, SRS shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by SRS at any time since May 24, 2004.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent Stagehands Referral Service has taken to comply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 31, 2006

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to refer Stephen Foti for employment for arbitrary, invidious or capricious reasons.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with Stagehands Referral Service, LLC make Stephen Foti whole, with interest, for any loss of wages and other benefits he may have suffered by reason of our discriminatory failure to refer him to employment after May 24, 2004.

INTERNATIONAL ALLIANCE OF THEATRICAL & STAGE EMPLOYEES & MOTION PICTURE TECHNICIANS OF THE UNITED STATES & CANADA, LOCAL 84, AFL–CIO

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain with Respondent International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO an exclusive hiring hall system under which applicants for employment are discriminated against for arbitrary, invidious or capricious reasons.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL jointly and severally with Respondent International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO make Stephen Foti whole, with interest, for any loss of earnings and benefits he may have suffered after May 24, 2004, by reason of the discrimination against him.

STAGEHANDS REFERRAL SERVICE, LLC

Patrick Daly, Esq., for the General Counsel.
Leon Rosenblatt, Esq., for the Respondents.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on April 5 and 6, 2005, in Hartford, Connecticut. The consolidated complaint which issued on February 28, 2005, and was based on unfair labor practice charges and amended charges that were filed on September 24, 2004,[1] November 26 and December 29 by Stephen Foti, alleges that Respondent Stagehands Referral Service (SRS) violated Section 8(a)(1)(3) of the Act by failing and refusing to employ Foti because he was not a member of Respondent International Alliance of Theatrical & Stage Employees & Motion Picture Technicians of the United States & Canada, Local 84, AFL–CIO (the Union), and that the Union violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to register Foti for referral and refer Foti to employment because he was not a member of the Union and for reasons other than his failure to tender the periodic dues and initiation fees uniformly required by the Union.

[1] Unless indicated otherwise, all dates refer to 2004.

FINDINGS OF FACT

I. JURISDICTION

SRS admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

The Union admits, and I find, that it has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

SRS is a limited liability corporation that was established by the Union and is located in the Union's office. Union President Charles Morris and Union Business Manager Charles Buckland are the two officers of SRS. One of the largest employers in the area is the Mohegan Sun Casino and Hotel (the Casino) operated by an Indian tribe. The Union established SRS because the Casino, while willing to employ union members, was unwilling to recognize, or sign contracts with, unions. Consequently, while they would not take referrals from the Union, they would from SRS. Therefore SRS refers union members and nonmembers to the Casino, sends an invoice to the Casino for all the hours worked by the referred individuals and the Casino pays this invoice. SRS then issues paychecks to all those who were employed at the Casino, with the usual payroll deductions. The Union itself, not SRS, refers individuals to work at other locations in the area with which it has a contract, principally, the Hartford Civic Center, the Meadows, and the Bushnell Theatre.

Foti has been engaged in some sort of theatre work for most of his adult life. Prior to moving to Connecticut on November 2001, he worked as a promoter, a stagehand, building and setting up stages and decking, and as an audio engineer in the Los Angeles, California area, the New York area and Cleveland Ohio. In about December 2001, he called the Union and asked about getting referrals to jobs and was told to call the union business manager on Mondays, which he did and, beginning about 5 months later, he began getting referrals to the Casino, the Civic Center, Bushnell, and the Meadows. In addition, Local 52, a sister local of the Union, put in a call for help and Buckland sent him to a job in New Canaan, Connecticut. These job referrals continued through May.

The Union's rules provide that individuals can apply for union membership after performing unit work for 18 months, and Foti applied for union membership in April. He went to the union hall, completed the application, and paid the required fees, including a $100 fee for a background check which he passed. The next step for Foti and the nine other applicants in the application process was an interview on April 26 with the Union's executive board, composed of Buckland, Morris, and other officers of the Union. He was questioned by members of the executive board about his commitment to the Union and their referrals and Foti assured them that he would be able to commit, and his application was approved by the executive board. Following executive board meeting, there was a regular membership meeting of the Union in which the applicants' qualifications for membership was discussed by the members. Voting was to take place at the following membership meeting on May 24.[2] Member Jason Philbin testified that he spoke at this meeting and told the membership that he worked with Foti more than most of the members, and that he was going to vote against him because he was lazy and often late on the jobs. Member Stella Cerullo testified that to her recollection, only Philbin spoke directly about Foti, although there were comments that the members should "vote our conscience . . . and we know that there are people on that list that are not qualified to come in so . . . you should think about it before you actually vote." Member Michael Philbin testified that he voted against Foti at the May meeting because he felt that Foti was not a "team player."

Morris testified that he was amazed at the number of people who spoke negatively about Foti at this meeting. A number of members expressed concerns that they didn't feel safe working alongside of him, and were concerned with his work ethic and habits. He did not anticipate these comments because he had never worked on the same crew with Foti. Buckland testified that at this meeting each of the applicants was discussed in alphabetical order and there were questions about each of the applicants, but there were more hostile comments about Foti then any of the other applicants.

The actual voting took place at the next meeting on May 24. At this meeting the members were reminded that the Union constitution provided the criteria for Union membership: that applicants must display aptitude, a good work ethic, trade skills, and a commitment to enhance the causes that embody trade unionism. Foti testified that he and the other nine applicants were seated in the front row when the meeting started, and, prior to the voting, they were escorted to a room next door. About 45 minutes later Morris came into the room and said that nine of the applicants had been accepted and one had not. He asked the other nine applicants to go back in to the meeting room and he asked Foti to stay where he was, which signified to Foti that he was the one who was rejected for membership. He asked Morris, "How can that be?" All Morris said was that he was surprised, he didn't expect it. As Morris was escorting him out of the room past the membership, he told Morris that it was the most embarrassing thing he ever experienced, but he never told Morris, at that time or at any time, that he no longer wanted to be referred to jobs by the Union. Morris testified that after opening the May 24 meeting he introduced the applicants and had them leave the room until the members voted. The vote on Foti's application was 11 in favor, 33 against. All the other applicants were accepted. That was the first occasion that he could remember where an applicant was rejected for membership by the members. He then left the meeting room and told Foti that his application had been rejected. As they were leaving the room, he asked Foti, "What do you want to do?" Foti responded, "I'm too embarrassed to be around you guys." They shook hands, and Foti left the meeting. Morris testified that he "took" Foti's words to mean that he was too embarrassed to be working with them or to be around them, and that is what he relayed to Buckland about this conversation with Foti a few days later when they talked about what they were going to do and what the vote meant.

Buckland testified that he was surprised by the vote rejecting Foti's membership application. Even though there were anti-

[2] Foti testified only about the May 24 meeting, where the voting place, apparently, because the applicants were not present at the regular union meeting on April 26.

Foti comments at the prior meeting, that had happened before, but applicants had never previously been rejected. Buckland was then asked whether he drew any conclusions from the vote. He testified, inter alia:

> Mr. Foti definitely worked a lot and because he said yes a lot…there were several times he was unavailable, but that was his option as an extra. I didn't have any problem with that.
>
> But when he was available, I don't recall a whole bunch of time . . . that he would refuse work. He would go almost anywhere I asked. So, what I felt, although it was a great sacrifice to me, that the body, the membership, had sent me a clear and concise signal that the man was not a competent person to work with and I would have to discontinue hiring him.
>
> And . . . it's inherently my job as a business agent for the employers who I negotiated with . . . to find a better wage and . . . better conditions for them, to send them a person who, who I've been entrusted with sending them competent, professional people . . . I would be a hypocrite to continue to work and entrust myself to the employers, and to turn around and send incompetent stagehands.

He testified that prior to the vote, he was not aware of the problems that the members had with Foti's work: "Mr. Foti flew under the radar." A few days after the meeting, Buckland asked Morris, "Where do we go from here?" Morris told him that Foti's response to the vote was that he was too embarrassed to work, he doesn't know how he could work with the members after the vote of no confidence.

Buckland testified that Foti called him a few days later and asked about the possibility of work and Buckland mentioned the vote of the members. Foti then asked if that meant that he couldn't work for SRS at the Casino as well, and Buckland responded, "As far as I'm concerned, we're both the same . . . In other words, I'm not going to send inferior people to one place that I wouldn't send to another." Buckland was then asked:

> Q. Did you tell him he could never work with Local 84 again?
>
> A. I believe it was more like, at this time, I don't think it would be a good idea. There was also the case . . . he was just voted not to work, there's a potential for a hostile situation, plus I'd give him an opportunity to improve his job skills, work skills. So . . . I did not close the door.

Foti testified that his last job ended on about May 29 and since he had not heard from Buckland with any referrals, he called Buckland at that time and asked him if any work was available and Buckland said that he couldn't take calls from the Union because his application had been denied. Foti asked if there he could work as an extra through SRS, and Buckland said, "No, you cannot take any of those calls." Buckland added that it was unfortunate because Foti was a "Yes man" when he offered him work, and he needed that. That was the last time that Foti called the Union looking for referrals, "I was told there was no work for me."

Foti testified that his next contact with the Union was a telephone call that he received in late November from Morris, who told him that there was work available and that if he wanted it, he should call Buckland on Monday. During this conversation Foti told Morris how angry he was at the way things happened 6 months earlier. Pursuant to Morris' instructions, Foti called Buckland on Monday, and Buckland referred him to a job about ten days later in early December. Foti called Buckland next in about late March 2005, but Buckland told him that all the calls for that week had been booked. Foti asked if he should call back on Monday, and Buckland answered "yes." Morris testified that he called Foti on November 24 because SRS received a notice of liability from Unemployment Insurance regarding Foti. He was "a little perturbed" about this notice because Foti had not been calling in requesting work, yet he filed an unemployment claim against SRS. He called Foti and asked, "What's up. Why aren't you calling in on Monday morning?" Foti was angry. He said that the Union "had f–ked him," and he was going "to f–k the Union." Morris told him not to be so confrontational, and Foti said that he was going to hurt Jason Philbin and Bob Burns the next time he saw them because they spoke against him at the union meeting. Morris asked Foti why he was trying to collect when he never told the Union of his availability to work. Morris also reminded him that in May he told Morris that he was too embarrassed to work with the members, and Foti said that he didn't remember having said that. Morris told him to call Buckland on Monday, November 29, which he did and he was referred to work, and Foti did not call again until the end of March.

As stated above, the allegations are that SRS failed to employ Foti after May 24 because he was not a member of the Union and that the Union failed to refer Foti to employment because he was not a member of the Union, in violation of Sections 8(a)(3) and 8(b)(1)(A) and (2) of the Act. The Union and SRS defend that the refusal had nothing to do with his lack of union membership. Rather, the meetings in April and May made them aware of Foti's poor work, and they did not feel comfortable referring a poor employee to the employers with whom they deal. According to the Union and SRS, Foti's poor work performance falls into a number of categories: lateness, a lack of initiative on the job, coming to work without all the required tools, and his unsafe work performance. There was also some testimony regarding whether Foti refused referral calls from the Union. However, because Buckland testified that he was sorry to lose Foti because he was "a yes man," generally available for calls, that issue will not be discussed further.

Union member Robert Tabara testified that he voted against Foti at the May meeting because of his work ethic, his lateness to work calls, and his lack of initiative in not being willing to assist others. As regards lateness, he testified, "[I]t just shows what type of person you are. Are you responsible? Are you obligated to your job or not? 90–98 percent of the local knows that being on time is one of the main important things"

He testified that he worked with Foti on about 20 occasions and that Foti was late on about 5 of those occasions although he could not estimate the length of time that he was late. He remembers, because, "[I]t's noticeable when everybody is working and all of a sudden one of the guys walks in late . . . everybody sees it." He testified, "If you are 1 minute late or 5 minutes late, it doesn't matter, you're late, 'There's no leeway."' Other stagehands have been late as well. Union member Stella Cerullo testified that the impact of a stagehand being late depends upon the size of the crew working on the event, "If it's a large crew, probably not much of an impact. If it's a smaller crew of, let's say, ten people . . . it could make a big impact." Jason Philbin testified that he has worked with Foti on from 50 to 100 occasions and spoke at the April meeting and said that he was going to vote against him because he was lazy and was

often late to assignments. He estimated that Foti was late on about 10 occasions, with a range of from 1 to 30 minutes. Philbin himself has been disciplined by the Union's executive board for not appearing for a job. He overslept and by the time that he called the Union he had been replaced on the job. The Union's executive board told him that he would be disciplined by no longer being assigned to the show that he missed. Michael Philbin, the lead and steward at the Casino, testified that Foti worked at the Casino on approximately 150 occasions and was late on about half of the days, for between 5 and 10 minutes. Member Patrick Whelan testified that he has worked with Foti on about 50 occasions and he reported 5 to 10 minutes late from 20 to 40 percent of the time. Foti testified that he is punctual and reliable in getting to the jobs on time and during the 2-1/2 years that he was referred by the Union and SRS he was late on about three occasions for between 2 and 3 minutes.[3]

There was also testimony from union members that Foti did not show enough initiative on the job. Tabara testified about his difficulty with Foti's work:

> Steve was holding the cart rather than . . . giving the extra effort of helping somebody out with a heavy piece . . . Not take the extra initiative to pitch in and . . . just give an extra effort . . . that's somebody who I don't feel is worthy to become a full time member. Why would I want to vote in somebody like that when they're not giving it their all 100% all the time?

Regarding what he referred to as Foti's lack of initiative, he testified:

> Very lackluster. Just go through the motions instead of . . . what do we have to do next? What can I do next for you? What needs to be done? Who can I help out? Instead of . . . taking the initiative to go and ask what you can do instead of being told hey Steve, come with me, do this.

Cerullo testified:

> We have . . . people that are leaders and we have people that are followers…your objective is to help . . . the road crew. They're the people that are touring. They're the people you're supposed to be there for in lieu of them traveling with their own 500 person crew to set things up. And your job is to go to them and continuously ask them what they need help with next. You're supposed to jump in, take the initiative, and essentially help everybody out. Some people need to be babysat, or handheld, or dragged along and some people don't . . . Nine times out of ten we would have to coax him [Foti] into stepping up or pitching in a little bit more than the rest of us.
>
> [Y]ou're putting deck together, there are people that will jump in and take the weight of that job and then there are people that will stand on the sidelines and wait to be told what to do. So you have the option to pick the easy job out of the group. You also have the option to stand there and wait for somebody to say, hey, can you give us a hand or, hey, can you jump in or, hey, do you mind doing that? That's the difference between a person that's stepping up and taking leadership and a person that's just there as a background being prompted to do something.

She testified that, in her opinion, there are three categories of employees: leaders, followers, and standby persons, the latter being warm bodies that need to be handheld; in her opinion. Foti fell into this latter category and that is one of the reasons that she voted against him in May.

Jason Philbin testified that Foti, "was somebody who doesn't take initiative, who stands there and watches everyone else do something until he's asked to do something. And then he may or may not do it even if he's asked." Whelan testified to a situation at the Meadows in 2003 when Foti complained that his assignment that day was as a loader and he threatened to leave because of it. Whelan calmed him down and convinced him that it would not be a good idea to leave the assignment, and Foti returned to work. He testified that he voted against Foti at the May meeting because he needed continuous direction, he would not follow recommendations and he was argumentative. He testified that Foti "was kind of argumentative sometimes when someone, the tour people who travel with the tour know what needs to be done, and our job is just to zip it and do it." Foti was "[f]ocusing more on his ideas of how it should be done, instead of focusing on doing it." He testified further that Foti "needed continual direction or you'd explain something to him and . . . he would go off to do something else." Whelan, who considers himself as an experienced stagehand, testified that when he tried to explain something to Foti, Foti was "argumentative and . . . not really willing to accept [his] foresight and knowledge."

Member Alfonso Lopez, a rigger, testified that as a rigger he is stationed from 60 to 90 feet above the stage, and from there: "You can see guys that are working, you can see guys that aren't working." He has worked with Foti on, at least, 50 occasions. There were occasions when he saw Foti standing around, rather than moving around like other crew members and on about ten or twenty occasions, when Lopez came down from the rigging, he saw Foti, whom he hadn't seen from the rigging. He testified that Foti could not have been performing his work without Lopez being able to observe him from the rigging. He testified that he voted against Foti at the May meeting because he didn't agree with Foti's work ethic:

> [T]he people I like to work with are people that don't need direction, that know what they're doing, they come prepared. And Steve, for some reason, needs a lot of direction. He needs to be told what to do, when to do it. After you've done this enough times, you know when to do it . . . you just fall in and just do what you've got to do to get the job done.

Finally, Lopez testified that the day prior to his testimony herein, he was having difficulty with another employee, Brian Fulco, who was standing around and talking, rather than working. When Lopez told Fulco to hurry up and do some work, Fulco responded with a mean look and said, "Who do you think I am, Steve Foti?"

Foti testified that in about 2002, after he had performed a job at the Casino, Mike Philbin, the lead at the Casino, told him

[3] A lateness report for the Casino for the period August 23, 2003, through December 9, 2004, prepared by Michael Philbin, "when I have time to do it" states that Foti was 30 minutes late for a job on February 20. The reason that he gave for being late was that he thought the call was for 10:30, not 10. There are 112 other latenesses in this report covering a 16-month period. Tabara is listed once as being 42 minutes late because he overslept, Whelan is listed once as a "no show" because of car trouble, and Jason Philbin was 16 minutes late on one occasion because he was stuck in traffic, and was a no-show/no-call on three occasions. Whelan prepared a lateness report for the Meadows venue for the period of about November 2003 through about July 2004. It lists 35 employees who were late a total of 49 times. Of this total, Foti was late twice for 5 and 15 minutes.

that in the 20 years he has been in the business he had never received the compliments on anybody's work as he had received for Foti. In addition, Foti was sent to a 1-day job for a different local union, but because of his work, he was complimented and the job lasted for 30 days.

Another complaint about Foti is that he did not have his tools, or enough tools, with him when he came to jobs. Tabara testified to a job at the Meadows in 2003 when he and Foti were deck carpenters, but Foti, "didn't come to work prepared. Most people come to work prepared with a bag of tools. He didn't have his tools on him." Cerullo testified that when she goes to a call she brings a tool bag containing a hammer, an Allen set, vice grips, and certain standardized tools. In addition, she carries a tool belt, which has a knife, a wrench, and a flashlight. She has seen Foti carrying a wrench to the jobs, but doesn't know what other tools, if any, that he has at jobs.

Finally, there was testimony of a safety issue involving Foti. Mike Philbin testified to a situation in June 2002 when Foti was assigned by the then business representative to operate a truss spot, which involves a 30 to 40 foot high structure. The operator is required to climb to the top of the structure, sit in a chair at the top, and operate a spotlight from there. Before Foti went up the structure, Philbin asked him if he was all right with the assignment, and he said that he was. Foti climbed up the ladder and when he got to the top, he failed to connect the safety line to the lifeline attached tightly to himself. Philbin testified, "He was actually free up there. And the electrician was going bonkers. And we were both yelling . . . hook in, hook in. And, after a while, he made it to the chair and then he realized, he hooked in." At 6 p.m., when Foti came down, Philbin told him that the next time he goes up, the first thing he should do is to hook in and Foti agreed. After dinner, Foti went back up and, again, failed to hook in until Philbin and the electrician yelled to him to hook in. The danger was that Foti could fall from the truss because he was not secured. Whelan testified about a situation in 2003 when Foti was operating an electric motor that is attached to chains and cable that lifts the lights and sound equipment above the stage. Whelan noticed that Foti was operating the motor with the control, called a "pickle," but was not watching the motor as it was being operated and Whelan saw that the cable was about to be pulled into the gears of the motor, which could have chewed up the gears, exposed the electric wires and, possibly, caused major electrical damage. Whelan hollered for Foti to stop the machine, and he did so. Afterward, he told Foti that he had to focus more on what he was doing and to pay attention.

Morris and Buckland testified generally about the importance of referring only qualified employees to jobs. Morris testified that the Union was in negotiations with some of the employers and is in an adversarial position with one, Bushnell. Because of that, the Union must "put our best foot forward" by only referring competent individuals to jobs. In addition, Morris has attempted to eliminate disparity in treatment; if a nonmember is going to be penalized for being late to a job, the Union was also going to penalize members, such as Jason Philbin and another member, Gene Graves, for being late or being a no show. Buckland testified that he has been involved in three negotiations with these employers, which has resulted in better wages and working conditions for the members and extras, and in return he feels the obligation of referring only competent, professional people to work at these locations. Buckland named 12 extras who no longer received referrals because they either were found to be incompetent, walked off jobs, or had drug problems. He testified that there may be more, as well, and that one or two of those named may have returned to the Union's referral list by understanding the problem and retraining and correcting their problems.

Finally, counsel for the Respondents sent two position statements to the Region regarding the unfair labor practice charges herein. The first, dated November 8, states, inter alia, that after Foti's membership was rejected by the members, he "told the Union's president that he was too embarrassed by the vote to work under the auspices of Local 84." He further stated in this position statement, "[T]he Union would have referred the charging party to a job if the charging party had wanted to take a job, and if a job were available." In a position statement 2 weeks later, counsel states:

> Mr. Buckland denies that he told Mr. Foti he would never be referred to jobs. What Mr. Buckland recalls is that after the vote of the membership Mr. Foti asked him about an SRS referral, and Mr. Buckland said that "under the circumstances" he did not see how he could make that referral. The "circumstances" were that he had learned from members that Mr. Foti's membership had been voted down because they considered him to be an unreliable coworker, and even dangerous.

IV. ANALYSIS

This in not the usual Sections 8(a)(3) and 8(b)(1)(A) and (2) case where an individual is not hired, or is fired, by an employer because of his union or protected concerted activities case, or where a union has an individual fired, or fails to refer him to jobs, because of his intra-union or other protected concerted activities. In addition, there is no evidence of animus on the part of either the Union or SRS (which *really* is the Union). Prior to May, Foti was getting his fair share of referrals and, in April, the Union's executive board approved his membership application. It was not until the April membership meeting, when negative opinions were expressed about Foti's work, and the May meeting, where his membership application was rejected, that his referrals ceased.

It is true that since May 24 both the Union and SRS have failed to refer Foti to employment, with the exception of the November referral. The determinative question, however, is whether the Union and SRS failed to refer him for a prohibited motive. In *Operating Engineers Local 18 (Ohio Contractors Assn.)*, 204 NLRB 681 (1973), the Board stated:

> When a union prevents an employee from being hired or causes an employee's discharge, it has demonstrated its influence over the employee and its power to affect his livelihood in so dramatic a way that we will infer—or, if you please, adopt a presumption that—the effect of its action is to encourage union membership on the part of all employees who have perceived that exercise of power. But the inference may be overcome, or the presumption rebutted, not only when the interference with employment was pursuant to a valid union-security clause, but also in instances where the facts show that the union action was necessary to the effective performance of its function of representing its constituency.

I conclude that the Respondents have established that their failure to refer Foti to employment after May 24 was "necessary to the effective performance of its function of representing

its constituency."

I found all the witnesses to be credible, with the exception of Jason Philbin, who appeared to be overly careful in his answers, especially in answer to questions from counsel for the General Counsel. His reluctance may be due to the fact that his work record is less than exemplary. Although it is difficult to reconcile Foti's testimony about his work abilities with the testimony of Tabara, Cerullo, Michael Philbin, Whelan, and Lopez, I don't believe it is necessary or possible for me to make a direct credibility finding as to these witnesses and that issue. At the May 24 meeting, 9 of the 10 applications for membership were approved by the members; only Foti's was rejected, and that was the first time that an applicant been rejected by the membership. No evidence was adduced by counsel for the General Counsel to establish any animus or unlawful purpose in that rejection. Absent any other reason, the only reason that I could adduce from the membership's rejection of Foti's application is that they found his work and tardiness lacking. Therefore, although Foti appeared to be a credible witness, I indirectly discredit him because I could find no reason to discredit the other equally credible witnesses. *Blue Flash Express*, 109 NLRB 591–592 (1954); *Old Dominion Freight Line*, 331 NLRB 111 fn. 1 (2000). I also found Morris and Buckland to be credible witnesses whose testimony was reasonable. They seemed honestly surprised and disappointed by the membership's rejection of Foti, Buckland because Foti was generally available for referrals, when needed. I also found credible Morris' testimony that the Respondents have to put their best foot forward with the employers with whom they deal by only referring competent employees to these locals, and based upon the statements made about Foti at the April 26 meeting, and the lopsided vote against him at the May 24 meeting, he assumed that Foti was not a competent worker.

Admittedly, after the membership vote on May 24, Foti told Morris that he was embarrassed by the vote. However, I credit his testimony that he did not tell Morris that he was too embarrassed to ever work with the members again. In fact, a week later he called Buckland asking for work. I credit that testimony over Morris' testimony that Foti said that he was too embarrassed "to be around you guys" which he took to mean that he didn't want to work with them anymore.

The principal argument of counsel for the General Counsel is that the Respondent's violated the Act herein by not referring Foti to work after May 24 because on that day his membership application was rejected. Therefore, he argues, his failure to obtain referrals was caused by his union activities, his unsuccessful attempt to join the Union. This is an overly simplistic view of the facts, however. While it is true that on April 26 and May 24 his membership application was rejected, it was on those dates that Buckland and Morris learned for the first time from the members of Foti's shortcomings as a stagehand, and *that*, not the rejection of his membership application was the real reason for his not receiving referrals after May 24. Further, as counsel for the Respondent argues in his brief: "The fact that Foti worked as an extra regularly with SRS and was referred out regularly by Buckland completely undercuts any claim that Buckland, or Local 84, or SRS, was motivated positively or negatively by Foti's membership status."

In, an analogous situation, *Plasterers Local 299 (Wyoming Contractors Assn.)*, 257 NLRB 1386, 1395 (1981), the Board found that the union did not violate the Act by refusing to refer Jimmey Hamilton to work. In making this finding, the administrative law judge stated, inter alia:

> I have found that the Union's judgment as to Hamilton's lack of journeyman skills was the only reason why Hamilton was not included in the "A" or priority referral group. There is a total absence of evidence of any bad-faith or hostile considerations on Richard's or Sandra's part in making this judgment. I have further concluded that this judgment was not based on arbitrary, whimsical, or irrelevant considerations. Rather, it was genuinely based on objective indications that Hamilton's background experience was marginal . . . and further on objective indications that he was a substandard performer.

Two other cases, while not right on point, are helpful herein. In *Longshoremen ILA Local 341 (West Gulf Maritime Assn.)*, 254 NLRB 334, 337 (1981), the membership voted to bar the charging party from the use of the hiring hall and to expel him for instigating picketing regardless of a no-strike clause in the union's contract. In dismissing the complaint, the administrative law judge stated, inter alia:

> The legitimate interests of a union must be carefully balanced against the interests of individual employees when those employees are engaging in protected activity, but in this case there was no protected activity.

In *Stage Employees IATSE Local 150 (Mann Theatres)*, 268 NLRB 1292, 1296 (1984), the union received numerous complaints about the charging party's work and work habits, and many of the employers requested that he not be referred to their theatre again. In dismissing the complaint, the Board found that, "the Respondent used reasonable judgment, considering all that had transpired . . . in concluding that further referral of Simon would jeopardize its position as the exclusive supply of the employer's employees." In *Stage Employees IATSE Local 720 (AVW Audio Visual)*, 332 NLRB 1, 3 (2000), the Respondent had expelled the charging party from its hiring hall for misconduct toward fellow employees and employers, and 10 months later when the charging party reapplied, the Respondent refused to reconsider the expulsion or its refusal to refer him. The Board dismissed the complaint stating, inter alia:

> The critical inquiry therefore is whether the Respondent acted arbitrarily in its treatment of Lucas, because the Respondent's actions in operating its exclusive hiring hall must, of course, comport with the duty of fair representation. To establish "arbitrary" conduct, it is not enough to show errors in judgment, or that a more prudent union would have acted differently. To establish arbitrary conduct necessary for a breach of the duty of fair representation, it must be shown that the union acted in a way that is "so far outside a 'wide range of reasonableness' . . . as to be irrational." . . . That showing has not been made here.

The only evidence of pretext on the part of the Respondents is the conflict between counsel for the Respondent's two position statements, and Morris and Buckland's limited testimony that they felt that Foti did not want to be referred because he said that he was embarrassed to be with the members because they rejected his membership application. However, I find that this is not enough to overcome the balance on the credible testimony of most (all except Jason Philbin) of the Respondents' witnesses. I therefore find that the Respondents failed to refer Foti for valid reasons, and I therefore recommend that the com-

plaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. Respondent SRS has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondents did not violate Section 8(a)(1)(3), Section 8(b)(1)(A), or Section 8(b)(2) of the Act by failing to refer Stephen Foti to employment after May 24.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

It is recommended that the complaint be dismissed in its entirety.

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.